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SERVICE DATE – JANUARY 19, 2005

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-167 (Sub-No. 1095X)

CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION -
IN LANCASTER AND CHESTER COUNTIES, PA

Decided: January 18, 2005

In Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Bd., 252 F.3d 246 (3d Cir. 2001) (FAST v. STB), the United States Court of Appeals for the Third Circuit vacated and remanded to the Board this case involving the agency's historic review of a proposal to abandon a rail line known as the Enola Branch in Lancaster and Chester Counties, Pennsylvania. The Board's decision to allow the discontinuance of rail service on the Enola Branch is unaffected by the court's remand. However, the court ruled that the Board failed to comply fully with the procedural requirements of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). In doing so, the court vacated the Board's decisions issued in 1997 and 1999 denying the requests of the Friends of the Atglen-Susquehanna Trail, Inc. (FAST) to reopen and broaden the historic preservation condition imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), in a 1990 decision permitting Consolidated Rail Corporation (Conrail) to fully abandon the Enola Branch except for the bridges on the line.

Pursuant to the court's remand, the NHPA historic review process was reinitiated. Following further analysis of the identification and assessment of the effects of this abandonment on historic properties, public review and comment, and consultation with appropriate agencies, the Board's Section of Environmental Analysis (SEA) negotiated a Final Memorandum of Agreement (MOA) setting out appropriate historic preservation mitigation for this proceeding. The executed Final MOA was filed with the Advisory Council for Historic Preservation (ACHP) on August 4, 2004. It completes the historic review process in this case and demonstrates the Board's compliance with the NHPA and the court's decision. See 36 CFR 800.6(c). Accordingly, the historic preservation condition imposed in this proceeding now will be removed, and this abandonment licensing proceeding concluded, thereby allowing the railroad to fully abandon the line.

BACKGROUND

In 1989, Conrail filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon the Enola Branch. The Enola Branch extends generally westward from milepost 0.0 in Parkesburg, Chester County, to milepost 33.9 in Manor Township, Lancaster County. In this proceeding, some descriptions of the Enola Branch mistakenly have referred to the total length of the line as 66.5 miles of track; the railroad has since clarified that the line is mostly double-tracked and that only 33.9 miles of this line is actual rail right-of-way. In addition, Conrail evidently sold the portion of the line between milepost 1.5 and milepost 4.0 in 1996. The line passes through the Townships of West Sadsbury, Sadsbury, Bart, Eden, Providence, Martic, and Conestoga, and the Borough of Quarryville.

By decision served February 22, 1990, the ICC authorized the abandonment subject to an historic preservation condition, developed as a result of consultation with the Pennsylvania State Historic Preservation Officer (SHPO). The condition required Conrail to retain its interest in and take no steps to alter the historic integrity of the 83 bridges on the line – the only properties on the line that had been identified as historic – until completion of the historic review process. The purpose of the condition was to allow SEA to work with consulting parties to develop a plan to avoid, minimize, or mitigate any adverse effects of the abandonment on the bridges. The development of a mitigation plan was held in abeyance, however, pending negotiations to transfer the line for interim trail use/rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) or other public use under former 49 U.S.C. 10906 (now 49 U.S.C. 10905). When those negotiations proved unsuccessful, the NHPA process was resumed.

While SEA was working through the steps of the NHPA process for the bridges, FAST filed a petition with the Board to reopen the proceeding and broaden the NHPA condition so that it would apply to the entire line. The Board denied FAST's request in a decision served October 2, 1997 (1997 Decision), and in a decision served August 13, 1999, the Board denied FAST's petition for reconsideration of the 1997 Decision. FAST then sought judicial review.

In FAST v. STB, the court vacated the Board's 1997 and 1999 decisions, ruling that the Board had failed to comply fully with the procedural requirements of the NHPA. In particular, the court found that the Board had not complied with its obligations under the NHPA in identifying historic properties and abused its discretion by prematurely terminating the NHPA process. Consequently, the court remanded the case to the Board with instructions to follow the procedures of the NHPA regulations in concluding the case. As addressed in more detail below, the Board then reinstituted the NHPA process in this proceeding, in accordance with the court's remand.

DISCUSSION AND CONCLUSIONS

The Section 106 Process on Remand

Under section 106 of the NHPA, Federal agencies are required to consider the effects of their licensing decisions on historic properties and must give the ACHP a reasonable opportunity to comment on the proposed undertaking. 36 CFR 800.1(a). In this case, the entire Enola Branch, rather than only the bridges, had been determined to be historic by the Keeper of the National Register of Historic Places in 1999. Therefore, on October 24, 2002, SEA issued a Notice to the Parties in which it described the Board's reinitiation of the historic review process and announced that it would treat the entire line as historic.¹ SEA also provided information on the background of this case and solicited comments.

On October 20, 2003, SEA issued a second Notice to the Parties (October 2003 Notice), which addressed the comments and included a Draft MOA that set forth proposed measures for mitigating adverse effects to historic properties. In addition to providing a 45-day period for interested parties to file written comments on the proposed Draft MOA, SEA held two public meetings in Quarryville, Pennsylvania, on November 19, 2003. At the meetings, SEA staff explained the historic review process, informally answered questions, and solicited oral and written comments. Approximately 200 people attended these meetings, including elected officials, organization representatives, and private citizens.

Based on further consultation with the ACHP, the SHPO, Norfolk Southern Railway Company (NS) (which acquired the Enola Branch from Conrail)² and interested and official consulting parties, including the townships, government entities, and organizations such as FAST, as well as careful consideration of all comments from the public, SEA developed the Final MOA detailing measures to avoid or mitigate any adverse effects that the abandonment might have on historic properties. These measures include: documentation of appropriate representative structures on the Enola Branch to Pennsylvania state standards; archival research of the history of the Enola Branch; and consolidation of the documentation and the results of the archival research into one cohesive document to be archived at the SHPO's office. The Final MOA was made available to the consulting parties and the public in a third Notice to the Parties on April 12, 2004 (April 2004 Notice). The April 2004 Notice also

¹ In accordance with the court's decision, the Board expanded the historic review process on remand to cover all property not yet abandoned. Therefore, the historic review did not include the portion of the line that had been sold in 1996. See FAST v. STB, 252 F.3d at 262.

² See CSX Corp. et al.-Control-Conrail Inc. et al., 3 S.T.B. 196 (1998), aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2d Cir. 2001).

summarized and responded to all comments received in response to the October 2003 Notice and Draft MOA.

By July 2004, the Final MOA had been signed by the necessary parties (the ACHP, the SHPO, SEA, and the railroad), as well as the Townships of Martic, Providence, and Sadsbury. The executed Final MOA evidences the agency's compliance with section 106 of the NHPA. See FAST v. STB, 252 F.3d at 254; 36 CFR 800.6(c). Accordingly, the historic review required by the NHPA has been completed, consistent with the court's decision in FAST v. STB. Because the Board's work in this licensing proceeding has been done, it is appropriate now to remove the historic preservation condition and terminate the proceeding, thereby allowing the railroad to fully abandon the line.

Outstanding Issues

Interim trail use. Throughout this proceeding, there has been substantial support for converting the right-of-way to interim trail use/rail banking, pursuant to the Trails Act. Most recently, on March 22, 2004, Lancaster County (County) asked the Board to issue a Notice of Interim Trail Use (NITU) providing time for the parties to negotiate a Trails Act arrangement for the portion of the Enola Branch located between milepost 4.0 and milepost 27. NS filed a reply stating that it was unwilling to negotiate with the County for interim trail use. Accordingly, in a decision served on June 3, 2004, the County's request for the issuance of a NITU was denied. As explained in that decision, interim trail use is voluntary, and the Board cannot impose a NITU unless the railroad agrees to negotiate an interim trail use agreement under the Trails Act. National Wildlife Fed'n v. ICC, 850 F.2d 694, 700 (D.C. Cir. 1988); 49 CFR 1152.29(b)(2), (d)(1).

This does not foreclose the possibility that all or a portion of the Enola Branch could be converted to a recreational trail at a later date outside of the Trails Act process. A trail-use arrangement could be reached by private agreement of the parties after this proceeding is terminated and the abandonment is consummated. Such an arrangement would not involve this agency because the property would no longer be part of the national rail transportation system after the abandonment authority is fully exercised.

Indeed, in November 2004, the County filed a "Motion to Remove Historic Preservation Conditions and to Grant Abandonment Authority." The County notes that it has recently filed a "Declaration of Taking" in its Common Pleas Court seeking to use its power of eminent domain to acquire and preserve approximately 930.2 acres of the right-of-way for recreational trail purposes. In a reply filed on January 7, 2005, FAST states that it supports the County's preservation efforts. Once the historic preservation condition is removed and final abandonment authority is granted and exercised, there will be no ongoing Board involvement to impede the County's ability to proceed to seek to condemn the property and create a trail or park under state law.

We note that on December 13, 2004, the Townships of Conestoga, Martic, Providence, Bart, Eden, and Sadsbury (Townships) jointly filed a pleading challenging the County's ability to condemn the subject property under Pennsylvania law. However, the merits of the County's condemnation action is a matter for the Pennsylvania courts.

The County has also requested that we require NS promptly to file a notice of consummation to ensure that there will be a timely and definitive termination of the Board's jurisdiction. The Board's regulations provide that railroads can file a notice of consummation within one year of the decision permitting the abandonment. See 49 CFR 1152.50(e), 1152.29(e)(2). While this abandonment proceeding was instituted prior to the establishment of those regulations, given the unusual posture of this case, we direct NS to advise us within 60 days of the service date of this decision whether it intends to consummate the abandonment. In addition, we direct NS to file a notice of consummation to signify that it has exercised the authority granted, if it fully abandons the line.

Responsibility for the obligations in the Final MOA. The County further asserts that the additional documentation and historic preservation requirements adopted in the Final MOA are not necessary or required, since it has agreed to undertake the historic preservation activities required of NS under the Final MOA. In a response filed December 13, 2004, NS states that it would not oppose the County's motion, if there is a formal transfer of the obligations adopted in the Final MOA to the County and any additional costs are assumed by the County.

To the extent that the County argues that the documentation requirements in the Final MOA are unnecessary, it ignores the fact that the proposed recreational trail would only include part of the right-of-way. Furthermore, under the process agreed to in the Final MOA, only signatory parties may request an amendment to its terms and provisions. See 36 CFR 800.6(c)(1); Final MOA, Part IV. Therefore, this is not an issue that properly is part of our abandonment proceeding, which is complete. Rather, under the Final MOA, all of the signatory parties must be afforded the opportunity to review and act upon any proposed change. Id. Any further involvement of the Board will be in its role as one of the signatories to the Final MOA.

Implementation of the Final MOA. The Board has received separate comments from the Northeast Regional Field Office of the Rails-to-Trails Conservancy (Conservancy) and Mr. Randolph J. Harris, on behalf of FAST. Both argue that the section 106 condition should not be removed, and consequently that approval to fully abandon the line should not be granted, until all of the mitigation in the Final MOA has been completed.

It is the Board's practice to remove an historic preservation condition when an MOA is signed by the necessary parties and filed with the ACHP.³ There is no reason to depart from that practice in this case, because the Final MOA sets out a process to mitigate any adverse effects on historic properties resulting from the abandonment. Moreover, the ACHP, SHPO, SEA, and NS are all signatory parties to the Final MOA, which is a binding contractual agreement.

There is no reason to believe that NS will not comply with the Final MOA that it has signed, and both section 106 and the Final MOA include safeguards to ensure that the terms of the agreement are properly carried out. As part of the MOA process, any signatory party that is concerned that the terms of the Final MOA cannot be or are not being carried out may seek to amend or terminate the Final MOA under the procedures set forth in 36 CFR 800.6(c)(7) and (8). See Final MOA, Parts IV and V.

Mr. Harris has expressed concern regarding procedures for currently unanticipated discoveries of historic resources and the potential re-use of historic materials, should it be determined that any of the historic bridges must be dismantled. But these possibilities are specifically dealt with in Parts I and III of the Final MOA, as well as in 36 CFR 800.13. For resources that will not be dismantled or altered in the short term, Mr. Harris has inquired whether the municipalities must state during the recordation process how they intend to dispose of the resources or structures once they are under the individual municipalities' ownership. Under the Final MOA, the signatory parties and three municipalities have agreed to include in the Data Sheet, which is part of the required documentation, a description of certain representative structures and the proposed disposition of the structures. See Final MOA, Part I.B.(2) and (3).

The Final MOA further provides that a professional historian will prepare the required documentation (including the Data Sheet, Photo/Site Plan Sheet, and Narrative Sheet) based on all information available at the time. Once the documentation is complete, the draft document will be publicly available on the Board's website. As part of the MOA process, the ACHP, the SHPO, and the Board will then have 30 days to review and comment on the draft document, at which point the railroad will prepare a final version of the document for submission to all of the signatory parties, taking into consideration any comments received. See Final MOA, Part I.C. Mr. Harris and the Conservancy have suggested that the public and consulting parties also have another opportunity to submit comments. Under the terms of the Final MOA, however, the right to comment on the railroad's draft documentation is explicitly given only to the signatory parties. See id. Any other interested parties may submit comments, but the Final MOA creates no obligation to include such comments in the railroad's final historic documentation.

³ See Wheeling and Lake Erie Railway Company-Abandonment Exemption-in Harrison and Jefferson Counties, OH, STB Docket No. AB-227 (Sub-No. 9X) (STB served July 30, 2003).

Finally, it would be inappropriate to decline to remove the section 106 condition in order to give the County more time to reach an agreement to establish a recreational trail as the Conservancy suggests. As discussed above, the County has asked the Board to remove the historic preservation condition and terminate this proceeding so that it can proceed with its plan to create a recreational trail outside the auspices of the Trails Act on a portion of the right-of-way if the abandonment is consummated.

On December 28, 2004, the County filed a request that we grant it an extension of time to file a reply to the replies filed by NS and the Townships. The County's request will be denied. Granting the County's request would allow it to file a reply to a reply, a filing prohibited by our rules and only allowed when good cause is shown. Here, a reply from the County would only unduly prolong the proceeding. Furthermore, given the nature of our resolution of this matter, we do not believe a reply from the County is necessary.

In sum, because the Board has complied with section 106 and the Final MOA satisfies the court's remand, the Board's work in this case is now complete. Accordingly, it is appropriate to remove the historic preservation condition and terminate this proceeding at this time, thus allowing the railroad to fully abandon the line and the historic preservation mitigation to be prepared in accordance with the process agreed to by all the signatories to the Final MOA. Any further involvement of the Board will be as one of the signatories to the Final MOA.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The requests to postpone final abandonment approval until the requirements of the Final Memorandum of Agreement have been completed are denied.
2. The executed Final Memorandum of Agreement demonstrates the Board's compliance with section 106 under the regulations of the Advisory Council for Historic Preservation; therefore, the section 106 historic preservation condition imposed in this proceeding is removed, and this licensing proceeding is terminated, thereby allowing the railroad to fully abandon the line.
3. Lancaster County's November 2004 motion is granted in part and denied in part, as discussed above.
4. Lancaster County's request for an extension of time to file a reply to replies filed by NS and the Townships is denied.

5. Within 60 days of the service date of this decision, Norfolk Southern Railway Company shall notify the Board in writing whether it intends to consummate this abandonment.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Norfolk Southern Railway Company shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line.

7. This decision is effective 15 days after service of this decision.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary